In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1924.

No. 17.

HUBERT WORK, Secretary of the Interior,

Appellant,

versus

UNITED STATES, *ex rel.*, W. G. LYNN, Guardian of ROSA LASLEY,

Appellees.

PETITION FOR RE-HEARING.

Defendant in error petitions the Court for a re-hearing in the above entitled case and for cause thereof respectfully alleges that the court committed error in its judgment and opinion of November 17th, 1924, during the present term of this Court, in the following particulars:

A. ***The Court erred in holding that the "income" to be paid W. G. Lynn, as guardian of Rosa Lasley, an adult, was limited to $1,000 per quarter.***

FIRST: There is a well established rule of this Court, and other courts of review, that a litigant will

not be permitted to try his case on one theory in the trial court, and on another theory in the Supreme Court.

—*McGahan* v. *National Bank*, 156 U. S. 218, 39 Law Ed. 403;
Johnson v. *Towsley*, 13 Wall. 72, 20 Law Ed. 485;
Rodriguez v. *Vivoni*, 201 U. S. 371, 50 Law Ed. 792;
Virtue v. *Creamery Package Co.*, 227 U. S. 8, 57 Law Ed. 393;
Potter v. *United States*, 107 U. S. 126, 27 Law Ed. 330.

In the answer of plaintiff in error (Rec., p. 6), the Secretary of the Interior pleads the regulations promulgated by him under the Act of March 3, 1921, as follows:

> "With reference to adult Osage Indians not having certificates of competency, $1,000 shall be paid to each quarterly, so long as the income from oil and gas, and interest on their funds is sufficient to pay such amount, or full amount where less than $1,000, except where any adult Indian has a legal guardian, in which case all income available, including any amount in excess of $1,000 quarterly, shall be paid to such legal guardian."

This cause was tried on that theory in the courts below. There was no issue between the parties hereto as to the amount to be paid by the Secretary of the Interior to Rosa Lasley, under guardianship. The Secretary had construed the Act of March 3, 1921, to mean that W. G. Lynn, as guardian of Rosa Lasley,

was to receive the entire income. Lynn was not objecting to this construction of the statute. The issue raised by the pleadings was whether or not the Secretary of the Interior or the County Court would control the investment of the income of Rosa Lasley after the same had been paid to the guardian as an officer of the County Court. We respectfully submit, that it was the duty of the Secretary of the Interior to construe the Act of March 3, 1921, and to determine the meaning of the word "income" therein used, and the sums to be paid to those adults under guardianship, and that the Secretary's construction of same is binding on all parties, including the courts, until such time as his construction is questioned in a proceeding brought before the courts for that purpose.

SECOND: The use of certain words in the Act of March 3, 1921, were obviously not called to the attention of the Court, which words assist greatly in determining the Congressional intent. The section reads:

> "*Sec. 4.* That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency $1,000 quarterly except

where incompetent adult members have legal guardians, in which case *the income* of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly *out of the income* of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the Superintendent of the Osage Agency, and to invest the remainder after paying all the taxes of such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in the banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe; * * *" (italics supplied).

The Act of June 28, 1906, allotting the tribal estate, provided the sources from which the allottee would receive "income". The first part of Section 4 of the Act of March 3, 1921, reiterates those sources within a few lines, and provides that the member having a certificate of competency shall receive all income from these sources. Then provides, that the adult member not having a certificate of competency shall receive $1,000 quarterly "so long as the income is sufficient." But under authority of the Act of April 18, 1912, certain incompetent adult members had the additional care and supervision of the County Court, its officers and agents, presumed to be competent persons and of

an equal intelligence with those members having a certificate of competency, and Section 4 then provided, "except where incompetent adult members have legal guardians, in which case the *income* of such incompetents shall be paid to their legal guardians". No words of limitation, but the *income* shall be paid to their legal guardians.

As to minors, the third class mentioned in the opinion of the Court, the Congress used words of limitation, not called to the Court's attention, nor discussed in the Court's opinion. After providing for those holding certificates of competency, and for incompetent adults, both with and without guardians, the section provides that minor members shall receive $500 quarterly *"out of the income* of said minors" (italics supplied). Unless the estate has been added to by inheritance, the income of an adult and of a minor Osage is the same, whether the adult has or has not a certificate of competency. When Congress required $500 to be paid a minor "out of the income of said minor", they must have referred to the income the minor would receive were he an adult with a certificate of competency, and not the $1,000 he would receive were he an adult without a certificate, because in no part of the section is there any reference made to a minor's receiving $1,000. Congress used words of limitation when they intended a limited sum to be paid, but as to incompetent adults under guardianship no words limiting the word "income" were used.

We respectfully submit that there is error in the judgment and opinion rendered by this Court on November 17, 1924, and we respectfully pray of this Honorable Court a re-hearing of said cause.

PRESTON A. SHINN,
D. E. JOHNSON,
Attorneys for Defendant in Error.

Certificate of Counsel.

I, Preston A. Shinn, one of counsel for the defendant in error, W. G. Lynn, file this petition for a rehearing of my own free volition, believing that the Court has committed error as therein stated and thereby grave injustice has been done the defendant in error. And I further certify that this petition for a rehearing is filed in good faith for the purpose of having the Court correct what I believe to be manifest error in the opinion, and the same is not filed for delay nor for any purpose not made manifest in said petition.

PRESTON A. SHINN.